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IN THE

# Supreme Court of the United States

**OCTOBER TERM 1963**

**No. 640**

CARL I. COHEN,

*Petitioner,*

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Statement | 1 |
| Previous Proceedings | 1 |
| Jurisdiction | 3 |
| Clarification of the Issues Presented by the Petition | 4 |
| POINT I—Code of Criminal Procedure, Section 813-a offends no provision of the federal constitution | 5 |
| CONCLUSION | 21 |
| APPENDIX A | |
| Argument on Motion to Vacate and Set Aside Ex Parte Order, etc. | 22 |


### AUTHORITIES CITED

*Cases*


| | |
|---|---|
| Benanti v. United States, 355 U.S. 96 | 11, 12, 13, 17, 20 |
| Hoffman, et al. v. O'Brien, Police Commissioner of the City of New York, et al., 88 F.S. 490, affirmed, 339 U.S. 955, 70 S. Ct. 982, 94 L. ed. 1367 | 8 |
| Mapp v. Ohio, 367 U.S. 643 | 15 |
| Nardone v. United States, 302 U.S. 379 | 10 |
| Nardone v. United States, 308 U.S. 338 | 10 |
| Olmstead v. United States, 277 U.S. 438 | 9 |
| People v. Dinan, 11 N.Y. 2d 350 | 13, 15, 20 |
| Pugach v. Dollinger, 365 U.S. 458, 5 L. ed. 2d 678, 81 S. Ct. 650 | 17, 18 |

PAGE

Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232 ..... 10, 12, 17, 18, 20

United States ex rel. Graziano v. McMann, Warden. 275 F. 2d 284 (1960) ..... 15, 20

*Statutes*

N.Y.C. P.L.R. Section 4506 ..... 20
28 U.S.C. Section 1275(3) ..... 3
47 U.S.C. Section 605 ..... 3, 8, 11, 18

*Code of Criminal Procedure*

Section 738 ..... 19
Section 739 ..... 19
Section 740 ..... 19
Section 791 ..... 20
Section 793 ..... 7
Section 794 ..... 7
Section 813-a ..... 2, 3, 5, 18, 19, 20
Section eight hundred thirteen-b ..... 20

*United States Constitution*

Article 6 ..... 4
Fourth Amendment ..... 3, 5, 18
Fifth Amendment ..... 3, 10, 18
Fourteenth Amendment ..... 3

*New York Constitution*

Article 1, Section 12 ..... 7, 20

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### Statement

Petitioner seeks a writ of certiorari in order to review an order of the Supreme Court of the State of New York, Kings County; or in the event that jurisdiction will not lie to review this order, for a review of orders of the Court of Appeals of the State of New York and of a single Judge (Fuld, J.) of that Court, hereinafter more fully described.

### Previous Proceedings

Petitioner at all times hereinafter concerned rested under five indictments found by the Grand Jury of Kings County in 1960. Each charged him with the commission of the crime

of Abortion. In the course of judicial proceedings respecting these indictments he for the first time learned,—quite accidentally,—that on or about July 28, 1960 an order had been made by Honorable J. Vincent Keogh, then a Justice of the Supreme Court, pursuant to the provisions of the Code of Criminal Procedure, Section 813-a, which authorized the interception of telephone communications being transferred over a telephone located in petitioner's office in Brooklyn and registered on the records of the New York Telephone Company in his name. His knowledge of the existence of this order came solely through a voluntary disclosure of its making by a representative of the District Attorney of Kings County during judicial argument. The disclosure was not only voluntarily made; indeed, it may well have been unnecessary to the purposes of the judicial proceedings then in progress. Certainly it is correct to say that petitioner's awareness of the existence of the order was entirely fortuitous.

Petitioner then moved in the Supreme Court for two-fold relief. One form was for an order granting a hearing to determine whether or not the telephone interception order of July 28, 1960 had been issued after due compliance with the requirements of Code Crim. Pro. Section 813-a. The other type was for the vacature of the authorizing order itself. After due argument* before Honorable George A. Arkwright, a Justice of the Supreme Court, the motion was denied with an opinion on February 1, 1963 (petitioner's appendix, p. 28) which was thereafter implemented by the order of February 26, 1963 (Petitioner's Appendix A, p. 32), which is the subject of the present petition.

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* Petitioner does not include in the Appendix to his brief the minutes of argument upon the basis of which the motion was denied. We therefore annex them as Appendix A to our brief.

Petitioner appealed from the order. On April 17, 1963 the Appellate Division of the Supreme Court, Second Judicial Department, unanimously granted the People's motion to dismiss the appeal. No opinion was written.

Petitioner then took action of two-fold nature. Upon the assumption that the order was made in a criminal action and that an appeal therefrom lay only by permission granted by a Judge of the Court of Appeals or a Justice of the Appellate Division pursuant to Code Crim. Pro. Section 520, an application was made to Judge Fuld of the Court of Appeals for such leave to appeal. It was denied by him on July 10, 1963. Petitioner had simultaneously moved in the Court of Appeals for leave to appeal from the Appellate Division order of April 17, 1963. That Court denied leave to appeal on the same day, July 10, 1963. Neither Judge Fuld nor the Court of Appeals itself wrote an opinion.

The instant petition for the writ of certiorari follows.

## Jurisdiction

Jurisdiction for the present petition is sought to be invoked under 28 U.S.C. Section 1257(3). It is contended that petitioner's rights, privileges and immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self-incrimination) and the Fourteenth Amendment (due process of law) of the Federal Constitution and under 47 U.S.C. Section 605, were violated. It is, in amplification of this contention, asserted that New York's Code of Criminal Procedure, Section 813-a is repugnant to these amendments and to this statute (in the latter case be-

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cause of the supremacy clause contained in Article 6 of the Federal Constitution).

It is our answer that no Federal question, constitutional or otherwise, exists. That is to say, New York as a sovereign State is constitutionally empowered to enact the statute which permits the tapping of private telephones and the full utilization of information procured by such interception. Certainly where, as in the case at bar, no disclosure of the contents of the intercepted message has been made in judicial proceedings, New York's right to utilize the information thus procured *aliunde* is unquestionable.

## Clarification of the Issues Presented by the Petition

Throughout his petition reference is constantly made to another proceeding now pending, and undetermined, in the Supreme Court, Kings County. This is (1) a motion to suppress evidence claimed to have been seized during an illegal search of petitioner's office, and (2) to suppress evidence procured through the wiretap order heretofore discussed.

Petitioner asserts, and we do not dispute, that the search of his office was made without the issuance of a warrant. (It was in the course of the proceedings on this first-mentioned motion to suppress that petitioner learned of the existence of the wiretap order of July 28, 1960.)

It is, however, our submission that the issues presented by the pending motion to suppress evidence seized during an allegedly illegal search of premises is completely different from the litigation to which the present petition refers. That there may have been that type of search of premises

prohibited by the Fourth Amendment (which we by no means concede) is entirely irrelevant upon the question of whether or not Code Crim. Pro. Section 813-a violates any constitutional prohibition when it permits the judicial issuance of an order authorizing telephone interception. We shall, we are confident, establish the constitutionality of Section 813-a. It therefore follows axiomatically that if that statute is constitutional any other action taken by the police and/or the District Attorney not under its aegis, even if it were violative of the Fourth Amendment, would in no way affect the merits or propriety of the telephone interception made pursuant to Section 813-a.

We come, therefore, directly to the question of the constitutionality of that statute.

## POINT I

### Code of Criminal Procedure, Section 813-a offends no provision of the federal constitution.

For the convenience of the Court we set forth the statute *in extenso.*

> "Section 813-a. Ex parte order for eavesdropping.
>
> An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evi-

dence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

The safeguards against indiscriminate exercise of the statute are notable. The applicant must be either the District Attorney or the Attorney General of the State or a police official of responsible rank. The application for the order must be based upon a showing of reasonable ground for the belief that evidence of crime may be obtained by the wiretap. The identity of the persons involved must be de-

scribed. The Justice or Judge to whom the application is made has power to examine under oath as to these matters and he must be judicially satisfied "of the existence of reasonable grounds for the granting of such application."

One notes immediately the resemblance existing between these requirements and those which safeguard the rights of citizens in respect to the issuance of search warrants. Code of Criminal Procedure, Section 793 provides that:

> "A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."

Section 794 of the Code requires that:

> "The Magistrate must, before issuing the warrant, examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them."

Then, and only then, may he issue the search warrant.

The statute was enacted pursuant to the provisions of New York Constitution, Article 1, Section 12:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

We are confident that the statute may not be successfully attacked upon any claim that New York's Legislature was careless and improvident in the exercise of its authority. Only a conclusive showing of repugnance to a Federal Constitutional prohibition can avail petitioner. We shall demonstrate that the statute does not thus offend.

In 1949 an action was brought in the United States District Court for the Southern District of New York for a declaratory judgment that both the statutory and constitutional provisions above quoted, and all orders made by judicial officers of the State of New York pursuant thereto and all interceptions and divulgences made thereunder, were in violation of 47 U.S.C.A. Section 605. The complaint also sought an injunction against the future issuance of orders by New York Judges. *Hoffman, et al.* v. *O'Brien, Police Commissioner of the City of New York, et al.*, 88 F.S. 490. The case was decided by a Bench comprised of Learned Hand, C.J. and Conger and Ryan, D.J.J. The complaint was dismissed for lack of jurisdiction. This Court, upon a direct appeal from the judgment of the District Court, affirmed, 339 U.S. 955, 70 S. Ct. 982, 94 L. ed. 1367.

The District Court dismissed the complaint for the two-fold reason that no constitutional question was properly raised by the complaint and that the plaintiffs had "* * * no greater interest in the matter than any other citizens; they do not allege that they have been singled out, or are likely to be." It is, however, important to note the language used by Ryan, D.J. in the course of his opinion for the Court:

> "With the restrictions placed around the granting of orders of interceptions, it appears that even if

> plaintiffs' telephonic and telegraphic communications have, in fact, been intercepted and divulged, this was occasioned either by the fact that plaintiffs were using a telephone line concerning which there had been a judicial finding (ex parte, it is true, but based on sworn proof) that there was probable cause to believe that it was being used as an instrument of crime in the commission of crime, or that plaintiffs were in communication with an individual of whom such finding had been made. It is the alleged invasion of plaintiffs' civil rights pertaining to the privacy and secrecy of communications of this character which constitutes the sole ground alleged for jurisdiction of this court."

We concede, of course, that the rulings of the District Court and of this Court rest upon procedural grounds. It is, however, our submission that implicit in the case is a finding that neither the New York constitutional nor statutory provision offends the Federal Constitution. If either the District Court or this Court had felt otherwise, then in the case of the District Court the language which we have quoted would not have been used and, in the case of this Court, the reason for the affirmance would have been more explicitly stated.

We now proceed on the basis of the decisions of this and other Courts concerned with telephone wiretapping and interception.

The Court for the first time considered the question in *Olmstead* v. *United States*, 277 U.S. 438. The Court held that although the State of Washington prohibited telephone wiretapping, evidence procured in this manner by agents of the United States was nevertheless admissible against de-

fendants in a Federal prosecution for conspiracy to violate the National Prohibition Act. The specific holding of the Court was that such evidence was not repugnant to either the Fourth Amendment prohibiting unreasonable searches and seizures or the Fifth Amendment prohibiting compulsory self-incrimination.

It is true that Holmes, Brandeis, Butler and Stone, J.J. dissented in separate opinions. However, it cannot be questioned that evidence procured through telephone wiretapping remained constitutionally admissible in Federal Court prosecutions until the enactment by Congress of 47 U.S.C. Section 605 (Federal Communications Act).

The Court made it clear in the two *Nardone* cases (*Nardone* v. *United States*, 302 U.S. 379; *Nardone* v. *United States*, 308 U.S. 338), that the exclusionary effect of Section 605 was applied in Federal prosecutions to Federal agents, but that the rule of exclusion arose solely through the operation of the statute.

It is also indisputable that this Court as late as *Schwartz* v. *Texas*, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, refused to impose Section 605 upon the several States. Minton, J. wrote for a Court in which only Douglas, J. dissented:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested (citing).
>
> It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence.

> We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so."

Petitioner argues that the force of this clear and precise decision has been minimized, if not completely destroyed, by *Benanti* v. *United States*, 355 U.S. 96. This is, however, only wishful thinking.

In *Benanti*, the Court explicitly refused to rule upon the contention that evidence, obtained as the result of wiretapping by State law enforcement officers without participation by Federal authorities, was barred by the Federal Constitution as well as by Section 605 from reception in a Federal prosecution:

> "We do not reach the constitutional questions as this case can be determined under the statute."

The Court did hold that the evidence was rendered inadmissible in the Federal Court by the statute when obtained by either State or Federal agents through wiretapping.

True, the Court also said that Congress was constitutionally empowered to make Section 605 applicable to State agents, even where the State itself authorizes wiretapping "in the exercise of its legitimate police functions". ("It is undisputed that an order pursuant to that law was issued in this case and that it was executed according to State law".)

True it is, also, that the Court held that Congress had intended to prohibit wiretapping even under the aegis of State legislation:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

Petitioner, however, cannot take comfort in the last quoted language of the Court; nor can he correctly find in it a ruling that *Benanti* overruled *Schwartz* and that by implication, if in no other way, *Benanti* makes wiretap evidence inadmissible in a State prosecution (and derivatively renders unconstitutional a State statute authorizing wiretapping). This is the only possible construction of the Court's own foot-note No. 19 in *Benanti*:

> "Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, supra, is not to the contrary. While it refused to overturn a state rule of evidence, the Court was satisfied that the action of the state officials nonetheless violated Section 605. 344 U.S. at 202."

In sum, the furthest reach of *Benanti* is that it recognizes the criminality under Section 605 of wiretapping *and* divulgence by a State officer, even though his acts have been done pursuant to a State Court order. It does not, however, affect the admissibility of the evidence thus procured in the courts of those states which choose to receive it.

Certainly this has been the construction of *Benanti* by New York's Court of Appeals. In *People v. Dinan*, 11 N.Y. 2d 350, Van Voorhis, J. wrote:

> "In affirming the judgments of conviction of these defendants on gambling indictments, we consider that the intercepted telephone conversations on which these convictions depend are not rendered inadmissible by recent Federal decisions."

In reviewing the course of Supreme Court decisions and Congressional legislation respecting wiretapping, Van Voorhis, J. wrote further:

> "In many criminal prosecutions evidence obtained by wire tapping authorized by orders granted under the New York State Constitution (art. I, Section 12) and Code of Criminal Procedure (Section 813-a) has been introduced in criminal trials in New York State Courts. In 1928 the United States Supreme Court held that the tapping of telephone wires is not in violation of the Fourth Amendment protecting against unreasonable searches and seizures (Olmstead v. United States, 277 U.S. 438, 465). In the opinion it was said: 'Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.'
>
> Six years later, in June, 1934, section 605 of the Federal Communications Act was enacted in response to this suggestion. Section 605 was held to render wiretap evidence inadmissible in the Federal courts in

Nardone v. United States (302 U.S. 379) but to permit their introduction into evidence in trials in State courts (Schwartz v. Texas, 344 U.S. 199). That was the condition of the law when the United States Supreme Court was called upon in 1957 to decide Benanti v. United States (355 U.S. 96) which reaffirmed the doctrines enunciated in both Nardone v. United States and Schwartz v. Texas. The opinion in Benanti, by Chief Judge Warren (p. 101), says concerning Schwartz: 'The rationale of that case is that despite the plain prohibition of Section 605 (Federal Communications Act), due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect.' The Schwartz case was a wire-tapping case. The Supreme Court indicated in it that section 605 of the Federal Communications Act is violated by the procedure for obtaining wire taps prescribed by the New York Constitution and statutes, but made clear that such violations of this Federal statute are not sufficient to justify preventing the States from receiving such evidence in trials in State courts. The Federal statute itself contains no language forbidding the admission of such evidence in any courts. Benanti, Nardone and Schwartz held the means of obtaining such evidence to be illegal, but ruled that it was a question of policy of the forum whether the enforcement of section 605 of the Federal Communications Act should be implemented by imposing an exclusionary rule. Wire taps, it should be repeated, do not infringe constitutional immunity against unreasonable searches and seizures (Olmstead v. United States, supra). Exclusion of such testimony was ordained in the United States courts as a policy measure to aid in the enforcement of section 605. A contrary policy has been adopted in New York State (People v. Variano, 5

N.Y. 2d 391; People v. Dinan, 7 A D 2d 119, 6 N.Y. 2d 715), pursuant to the power reserved in the States by Schwartz v. Texas (supra)."

Petitioner attempts to argue that *Dinan* can no longer be considered good law because of this Court's decision in *Mapp* v. *Ohio*, 367 U.S. 643. In so doing he merely repeats the argument which the Court of Appeals there rejected in the language of Van Voorhis, J.:

> "Appellants argue that the decision in Mapp v. Ohio (367 U.S. 643), in 1961, deprived the States of the power reserved to them in Schwartz v. Texas (supra) to give effect to their own public policies in this regard. It is said that Mapp v. Ohio overruled Schwartz v. Texas by reading the exclusionary rule into section 605 of the Federal Communications Act, as, by analogy, it was read by Mapp into the Fourth Amendment, which was held to have been mandated on the States (in this respect) by the Fourteenth Amendment to the Constitution of the United States.
>
> The identical result does not necessarily follow in case of divulging telephone conversations in violation of section 605 of the Federal Communications Act, inasmuch as a statute may not possess the sanction of a constitutional inhibition protecting against fundamental rights granting immunity from unreasonable search and seizure."

New York's rule (vide *Dinan, supra*) has the concurrence of the respected United States Court of Appeals for the Second Circuit.

In *United States ex rel. Graziano* v. *McMann, Warden*, 275 F. 2d 284 (1960), the Court of Appeals unanimously affirmed an order which denied a petition for a Federal writ

of habeas corpus brought on by a defendant whose conviction in a New York Court had been affirmed by the Appellate Division (3 App. Div. 2d 1010) and the Court of Appeals, (4 N.Y. 2d 881), and to whom this Court had denied certiorari (358 U.S. 851). The petition for the writ of habeas corpus was grounded upon a contention that evidence obtained as a result of a wiretap made pursuant to Court order under Code Crim. Pro. Section 813-a had been improperly admitted against him in the State Court trial. Waterman, C.J. wrote for a unanimous Court:

> "We have no difficulty in unanimously affirming the District Court, despite the fact that evidence presented against appellant was obtained and divulged in violation of 47 U.S.C.A. Section 605. We believe that Schwartz v. State of Texas, 1952, 344 U.S. 199, 73 S. Ct. 232, 96 L. ed. 231, is complete authority for the result we reach. Provided it has logical reference to the proof required to establish guilt, wiretap evidence obtained by New York State officers who have been affirmatively authorized to tap pursuant to Section 813-a of the State Code of Criminal Procedure is held by the New York Court of Appeals to be admissible in criminal cases in the New York Courts. People v. Variano, 1959, 5 N.Y. 2d 391, 185 N.Y.S 2d 1, 157 N.E. 2d 857; People v. Saperstein, 1957, 2 N.Y. 2d 210, 159 N.Y.S. 2d 160, 140 N.E. 2d 252. Cf. People v. Dinan, 2nd Dept., 1958, 7 A.D. 2d 119, 181 N.Y.S. 2d 122, Affirmed 1959, 6 N.Y. 2d 715, 185 N.Y.S. 2d 806, 158 N.E. 2d 501, certiorari denied 1959, 361 U.S. 839, 80 S. Ct. 71, 4 L. ed. 2d 78. Even though, unless authorized by the sender, evidence obtained by intercepted wiretap would be clearly inadmissible in a federal court, Nardone v. United States, 1937, 302 U.S. 379, 58 S. Ct. 275, 82 L. ed. 314; Weiss v. United States, 1939, 308 U. S. 321, 329, 60 S. Ct. 269, 84 L. ed.

298, introduction of the identical wiretap evidence in New York State Courts, although clearly violative of the federal prohibitory statute, is not thereby prevented. Wolf v. People of State of Colorado, 1949, 338 U.S. 25, 69 S. Ct. 1359, 93 L. ed. 1782; Weeks v. United States, 1914, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652. Cf. Benanti v. United States, 1957, 355 U.S. 96 at page 101, 78 S. Ct. 155, 2 L. ed. 2d 126.

As was stated in Schwartz v. State of Texas, supra, 344 U.S. at page 201, 73 S. Ct. at page 234 '(e)nforcement of the statutory prohibition in Section 605 can be achieved under the penal provisions of Section 501.'

There was no denial of any constitutional right. Schwartz v. State of Texas, supra. Appellant cannot be heard to complain because the wiretap communications were divulged and were of assistance in convicting him.

Affirmed."

It bears repetition that Waterman, C.J. in reliance on *Schwartz* v. *Texas*, *supra*, stated:

"There was no denial of any constitutional right."

It is also to be noted that the case was decided after *Benanti* and in evident construction and adoption of that case as authority.

Petitioner struggles but, we submit, in vain, to escape the force of *Pugach* v. *Dollinger*, 365 U.S. 458, 5 L. ed. 2d 678, 81 S. Ct. 650 in which this Court affirmed a judgment of the Court of Appeals for the Second Circuit, 277 F. 2d 739, which in turn had affirmed a dismissal by the United States District Court for the Southern District of New York, 180

F.S. 66 of a complaint which sought an injunction against the introduction upon a State Court criminal trial of evidence procured through telephone wiretapping. This Court's brief *per curiam* opinion:

> "The judgment is affirmed on the authority of Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232 and Stefaneli v. Minard, 342 U.S. 179, 96 L. ed. 138, 72 S. Ct. 118."

is as dispositive of the question as would be reams of writing on the subject. As we have demonstrated, *Schwartz* v. *Texas*, *supra*, explicitly held that it was not the intention of Congress in enacting Section 605 to bar the introduction of wiretap evidence in State Court trials. When, therefore, this Court in *Pugach*, *supra*, affirmed on the authority of *Schwartz*, *supra*, it by necessary and inescapable inference reaffirmed its construction of Section 605.

In the light of this judicial history, it seems peculiarly, and particularly inapposite, to put it mildly, that petitioner should characterize New York's rulings as giving rise to an "all—but grotesque sort of situation."

The judicial and legislative history which we have outlined as our premise completely justifies the conclusion which we now express. It is: if the Fourth and Fifth Amendments to the Federal Constitution and Section 605 of the Federal Communications Act do not bar the reception in a State trial of wiretap evidence, then certainly they do not render unconstitutional the State statute,—Code Crim. Pro. Section 813-a,—whose sole and obvious purpose is so judicially to safeguard the procurement of such evidence as to reduce to the barest possible minimum the danger of unwarranted intrusion upon the privacy of inno-

cent citizens and at the same time to insure in the greatest possible maximum effect the prosecution of criminals.

Nor is there validity in petitioner's argument that New York's eavesdropping legislation, Penal Law Section 738, evidences an intention to limit the operability of Section 813-a as (in petitioner's words) "an explicit effort to show constitutional respect for Mapp and Benanti".

That section provides:

> "Section 738. Eavesdropping.
>
> A person:
>
> 1. Not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or • • •
>
> 2. • • •; or • • •
>
> 3. • • •;
>
> is guilty of eavesdropping,"

a crime which by Section 740 is constituted as a felony punishable by imprisonment for not more than two years.

What petitioner fails to note, however, is that Section 739 specifically exempts from the provisions of Section 738:

> "1. Eavesdropping pursuant to an ex parte order granted pursuant to Section eight hundred thirteen-a of the Code of Criminal Procedure."

It is thus evident that far from intending to limit the operability of Section 813-a, New York's Legislature speci-

fically implemented an obvious intention to permit the continued operability of Section 813-a under the aegis of carefully issued Court orders.

Petitioner's reference (p. 21 of his brief) to Code Crim. Pro. Section 791 is puzzling in its lack of appositness. That section defines a search warrant and the sections which follow (792-813 inclusive) regulate the issuance of search warrants. These statutes obviously refer to, and are in implementation of, New York's own Constitution, Article 1, Section 12, providing in part:

> "The right of the people to be secured in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,"

and being identical with the Fourth Amendment of the Federal Constitution. They can therefore have no relation to a Federal statute such as Section 605, from the exclusionary operation of which the States are specifically exempted by this Court. *Schwartz* v. *Texas, supra; Benanti* v. *United States, supra; People* v. *Dinan, supra; United States ex rel. Graziano* v. *McMann, supra.*

Lastly, we turn to petitioner's reference to N.Y.C. P.L.R. Section 4506. This statute excludes from reception in either civil or criminal trials "evidence obtained by any act of eavesdropping, in violation of Section seven hundred thirty-eight of the Penal Law, or by any act in violation of Section eight hundred thirteen-b of the Code of Criminal Procedure, *or by eavesdropping without Court order, as permitted by said section of the Code of Criminal Procedure,* when an

application for such order is thereafter made as required by said section but is denied, and evidence obtained through or resulting from information obtained by any such act * * *." (Italics ours) It is, however, so clear as not to need argument that wiretapping pursuant to the authorization of a Court order does not violate Code Crim. Pro. Section 813-b which regulates the provisions for the procurement of a wiretap or eavesdropping order under Section 813-a. This Court will have no difficulty, we are certain, in recognizing all of these references in their true character of window dressing. The Court will have equally little difficulty in therefore rejecting the contention, in itself no more than wishful thinking, that these statutes "were adopted in 1962 by the New York State Legislature in an explicit effort to show constitutional respect for Mapp and Benanti" (his brief, p. 21).

## CONCLUSION

**The petition for the writ of certiorari should be denied.**

Dated: Brooklyn, New York,
December 1963.

Respectfully submitted,

EDWARD S. SILVER
*District Attorney*
*Kings County*

WILLIAM I. SIEGEL
*Assistant District Attorney*
*Of Counsel.*

# APPENDIX A

## Argument on Motion to Vacate and Set Aside Ex Parte Order, etc.

SUPREME COURT, KINGS COUNTY

SPECIAL TERM—PART X.

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THE PEOPLE OF THE STATE OF NEW YORK,

—against—

CARL I. COHEN,

*Defendant.*

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(Ind. No. 4028/60; 4029/60; 4146/60; 4280/60; 4281/60.)

Brooklyn, New York
January 30, 1963.

Before:

HON. GEORGE A. ARKWRIGHT,

*Justice.*

Appearances:

EDWARD S. SILVER, Esq.
District Attorney, Kings County
By: William Siegel, Esq., of Counsel

WILLIAM W. KLEINMAN, Esq.
Attorney for Defendant,
Eugene Gold, Esq., of Counsel

SEYMOUR FRIEDMAN,
Official Court Reporter

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*Appendix A—Argument on Motion to Vacate and Set Aside Ex Parte Order, etc.*

Mr. Gold: This is an application, your Honor, to vacate and set aside an *ex parte* order of the Supreme Court, issued by a judge of the Supreme Court who no longer presides, pursuant to Section 813-a of the Code of Criminal Procedure, authorizing the interception of telephone communication on telephone number BE 6-3333, which had been issued by the Telephone Company to one Carl I. Cohen, the defendant in this matter.

An application had been made by the district attorney to the Supreme Court requesting that he be permitted to intercept telephone communications and, pursuant to that application, under section 813-a, the application was granted, and on July 28, 1960 such an order issued from this court.

I say now by way of emphasis, your Honor, that that order was issued pursuant to the authority of the Code of Criminal Procedure ex parte. Section 813-a provides, in part, that an order for the interception of telephone communications cannot be granted unless there is submitted to the supreme court judge at the time of the application sufficient evidence which indicates to the presiding judge that there is reasonable ground to believe that evidence of crime may be thus obtained. The latter portion of what I just said is a quote directly from the statute, your Honor.

The contention that we make here is that at the time of the application on July 28, 1960 there was no evidence before the Court which caused it to have reasonable ground that evidence of crime may be obtained by the interception of telephone communications.

The Court: Was there a record made at that time?

Mr. Gold: This is something the defendant does not know, your Honor.

The Court: Well, when you make the statement that at the time of the application there was no evidence before the Court, what is the basis for your statement?

Mr. Gold: The basis for the statement, your Honor, is this: On September 2, 1960 the defendant was arrested and charged with the crime of abortion. This arrest was approximately five weeks after the issuance of the court order authorizing a wire tap and at the arraignment in Felony Court of the defendant, who is a doctor, the district attorney who was there at that time stated in open court that the defendant had been under surveillance for a substantial period of time prior to the arrest.

The Court: You say this was stated in open court. Is there a record of that?

Mr. Gold: This is something that I am not aware of. It appeared in every newspaper in the City of New York.

The Court: If there was a record, I want to see the record. What you are saying now is just statement. You do not know anything about it, do you?

Mr. Gold: I know this, your Honor, that we had read in the newspapers at the time of the arrest, and in every newspaper, the precise quote that I make to your Honor that was made by the assistant district attorney as related at that time. And, as a matter of fact, I repeated this on April 12, 1961—

The Court: Well, even if you repeated it, that would not improve it.

*Appendix A—Argument on Motion to Vacate and Set Aside Ex Parte Order, etc.*

Mr. Gold: I say without contravention before Judge Rinaldi, and I will come to that, if I may, your Honor, in just a moment. But, the district attorney at that time—

The Court: Who signed the ex parte order?

Mr. Gold: Judge Keogh.

The district attorney stated at the time of the arrest of the defendant that he had been under surveillance for quite a substantial period of time and that, as a result of this surveillance, many women patients of Dr. Cohen had been interviewed and the result of these interviews proved futile; that each of the women interviewed indicated to the district attorney that they had not been aborted by the defendant Carl Cohen.

What I should like to point out to your Honor is this. If the district attorney's version prior to the arrest of the defendant indicated that he had not committed the crime of abortion, and the purpose of the wire tap order was to obtain evidence concerning the crime of abortion, then I would submit that the conclusion is inescapable: that there was no reasonable ground to believe that he would obtain evidence of the crime of abortion by the telephone interceptions.

May I say this to your Honor as well. Under the procedure outlined in Section 813-a of the Code of Criminal Procedure, there is no provision for the defendant to obtain either copies of the affidavits that are submitted—as a matter of fact, he is not aware that the application is being made, because these applications are made ex parte and so, of course, it is quite impossible for the defense to know, at least, at this time, what affidavits were submitted to the court, what measure of proof was before the court. But it seems to me that there is a responsibility on the part of

not only the district attorney but of the court to not only have the proper degree, the modicum, of proof at the time of the application, but that this may be reviewed at a subsequent time.

Now, I readily concede, your Honor, as the district attorney has so ably stated in his reply affidavit, that there is no provision in the Code of Criminal Procedure for a review of this ex parte application. There is no question about that. But I would submit this to your Honor, that under the circumstances of the Code of Criminal Procedure and the application being made ex parte, the defendant would have a right to go back before the judge who issued the original order, to have him determine anew whether there was in fact, in the light of new circumstances, sufficient evidence before him to justify the issuance of the original order.

Now, unfortunately here, we are confronted with the situation where the judge who issued the original order no longer is a justice of the Supreme Court. And so, of necessity, we must, as we did, make the application in Part I of the Criminal Term of the Supreme Court. That judge saw fit on a prior occasion to disqualify himself from any proceedings concerning this defendant, and so it has been referred to your Honor. It could not be referred to the judge who originally issued the order.

So that when the district attorney says that there is no provision in Section 813-a, or any other part for that matter, of the Code of Criminal Procedure for a review, we recognize that we cannot go to another judge of co-ordinate jurisdiction and seek to overrule his determination, unless there is some specific provision in law to do so. However,

what we do submit is that we can go back to the same judge.

Now, some reference is made in the reply affidavit, your Honor, to the fact that we may argue before your Honor that, in view of the fact that a review of an order authorizing a search warrant is provided for in the Code of Criminal Procedure, this situation that we have here under 813-a is analogous, and the district attorney quite properly points out that, under Section 807 of the Code of Criminal Procedure, there is a procedure outlined where a defendant may come in before the Supreme Court subsequent to the issuance of an order authorizing a search to be made, and attack the basis upon which the search warrant was issued. That is true.

But may I point out, your Honor, that prior to the enactment of Section 807 of the Code of Criminal Procedure, which was recently enacted, I believe effective July 1 of last year, that it was the practice—the accepted practice—although there was no provision for this kind of review, for a defendant to make an application to review before the judge who issued the order, the issuance of the search warrant, and that this was done despite the fact that the Code of Criminal Procedure was silent on the subject.

Now, what I would submit to your Honor in this regard is this. That despite the fact that the Code of Criminal Procedure has no specific outline of the method to be used to attack the issuance of an order ex parte authorizing the interception of telephone communications, despite the fact of any procedure, inherent in the power of the court is the right to review, by the judge who originally issued such an order, in his own conduct, his own actions.

Since what we are dealing with, your Honor, is a very substantial right of a defendant, of every human being, to remain free from this kind of intrusion, and in the light of the defendant's and the communities' right to remain free from this kind of intrusion, the legislature did see fit to enact Section 813-a of the Code of Criminal Procedure and to provide very specifically and very openly that before an ex parte order of that kind be granted, and I quote, "there is reasonable ground to believe that evidence of crime may thus be obtained."

Now, I would submit to your Honor that if the community is to be protected from frivolous applications for wire tap orders, of necessity the court must retain its inherent power to review such an order when it is issued, and under all of the circumstances it would appear to me, your Honor, and we respectfully submit, that we are entitled to a hearing to determine whether there was before Judge Keogh at the time of the application sufficient evidence submitted to him which caused him to have reasonable ground to believe that evidence of crime may be obtained by the issuance of that order and thereby the interception of telephone communications.

May I conclude, your Honor, with just this one comment? We are dealing in an area where the law of the land and the law of our State is in a constant state of flux. The interception of telephone communications and authorizations for it have been the subject of court decisions for these past few years in the Supreme Court as well as our State courts. I believe there is a recognition on the part of all concerned, both public authorities and defense counsel in general, that if we are to protect the community from this kind of instru-

sion, that some procedure must be adopted where we can restrain the conduct of public officials from the unauthorized and unwarranted use of wire taps.

I am sure your Honor is aware that in 1935, I believe it was, the Congress saw fit to enact Section 605 of the Federal Communications Act which prohibits the divulgence of intercepted telephone communications without the express consent and permission of the sender of the telephone call. I think this was a recognition on the part of the Congress which, to a degree, I suppose, has been imposed upon the States as well, that the public need must be satisfied before a wire tap is authorized.

And so, your Honor, I would say that on the question of the power of this court to review, that the public need is sufficient to warrant this court to exercise its inherent power to review whatever it has done ex parte, and that the burden still rests on the district attorney in the light of the provisions of Section 813-a to submit proof, if necessary de novo, to the court that he was justified in making the application, and that the court was justified in issuing an order authorizing wire taps.

If the mandate of Section 813-a is to be given any meaning at all, it must be that the procedure that we are following here is permitted, and we can only point out to your Honor that we know many instances where, under the issuance of search warrants, orders authorizing a search to be made, that frequently the district attorney has made such applications where there has been insufficient proof to justify the issuance of the order and that the court has seen fit under those circumstances to set aside its own order. Judge

Barshay only recently, in an application I may say that was made by me, your Honor, vacated and set aside a search warrant, an order authorizing a search to be made, where he himself was the issuing judge because the district attorney had failed to submit the required proof to him, and that perhaps there was a misunderstanding or a misinterpretation in the light of the newness of these statutes on both the court's part and the district attorney's part. And that we have the same situation here, your Honor.

What we are dealing with is an area which has not been explored to its ultimate degree, its ultimate extent. Under the circumstances, all the circumstances, I would submit to your Honor that not only does your Honor have the power to review the order that was issued by Judge Keogh, but that your Honor also has the power to direct a hearing to determine whether the evidence that was presented to Judge Keogh at the time on July 28, 1960 was sufficient to justify his conclusion that he had reasonable ground to believe that evidence of a crime would thus be obtained.

Under the circumstances, your Honor, I respectfully request that the relief sought in the notice of motion be granted.

Mr. Siegel: May it please the Court, the method which my young friend has chosen, the method of argument by which he presents his case, compels me to depart for a moment, the briefest moment, from the exact merits of the motion, because I have to answer a philosophic disquisition on his part, which really has no proper place in the argument of this motion. Whether or not wire tapping is a proper method of the enforcement of the criminal law will be debated, as

it has been debated, for months and for years to come, and people can reasonably differ about that. That there is a strong point of view that it should not be done is shown by the enactment by Congress of Section 605, as it is familiarly known, to which Mr. Gold has referred. But the important fact is that in the State of New York wire tap or evidence received through a wire tap is still admissible. Our own Court of Appeals has ruled in that fashion and specifically on that point as recently as People v. Dinan, 11 N. Y. 2d.

So that whatever time Mr. Gold has occupied in presenting his philosophical point of view to your Honor, while it is quite interesting and while it is very ably presented, is still outside the confines of this motion.

Now I address myself to the motion. The district attorney has two answers to it. The first is that there is no procedure which authorizes the motion. The right of a justice of the Supreme Court to issue an order permitting the interception of messages on a telephone, popularly known as wire tap, is established by the legislature. That is Section 813-a of the Code of Criminal procedure.

That statute, as your Honor will find when you read it, throws many safeguards around the person in whose name the telephone is registered. It cannot be made by anybody at all. The application must be made by the district attorney or the attorney general or one of their assistants, or a police officer over a certain rank. It cannot be made by just any policeman. I think it must be of the rank of sergeant or higher.

The Court must be satisfied from the moving affidavits "that there is reasonable ground to believe that evidence

of crime may be thus obtained." Therefore, the wide discretion which the legislature has given to a justice of the Supreme Court in the issuance of the order at the same time has guides to enable him to decide whether or not and how he could employ his discretion. But the legislature has nowhere said that this exercise of discretion by the issuance of such an order may be reviewed. And there are considerations which show that it should not be reviewed by any other justice of the court, and I think even by the justice issuing it, although that may be a debatable proposition.

In every other instance where the legislature deemed that a defendant should have a right of review of an order which in its issuance was ex parte, not on notice to him, there is a statutory provision. Thus, we can go in and get a search warrant ex parte, but the defendant knows of the existence of that because his home is reached under the search warrant, or some premise belonging to him, or his property is taken. Therefore, he is on notice that there is a search warrant, even though he was never on notice that a search warrant would be applied for.

That is not the case here. It is only by the merest accident that this defendant or any other defendant may learn of the existence of this wire tap order. In the generality of cases he never knows of it until he comes to trial and the product of the wire tap is introduced, and legally, so, in evidence against him.

Now, if it is only by the merest accident that a defendant may ever know of the existence of a wire tap order, how can it logically, legally and even philosophically be argued that the legislature ever intended that he should have a

right of review? The administration of law is not based on accident. It is based and consists of rules for the governments of those which usually have them.

I think that alone would be a sufficient answer to this very ingenuous, I must say, rather than ingenious, argument of my young friend. That is answer number one, that there is no provision by statute, therefore there is no power in the court.

I think that disposes of the concomitant argument that because Mr. Justice Keogh is no longer sitting, some other justice of this court should review his action. Let's assume that he is sitting or was sitting. Certainly the application couldn't be made to anybody else because that would amount to seeking appellate review by a judge of co-ordinate jurisdiction of the acts of a judge of the same jurisdiction.

Now, that is on the procedure, and I am very confident, your Honor, and very sincere in my argument, there is no proper procedure. But I will assume for the moment that you may decide the motion is properly before you. I am going to hand up—I am not going to disclose—the contents of the supporting affidavits because that which the law said should have been secret when first handed to the court should remain secret. I am going to hand to your Honor the original order and the affidavits on which it is based. Section 813-a provides that once the order is issued it does not stay in the court. It goes to the person authorized to make the interception and that is his authority for doing so.

I am confident, when you read the suporting affidavit, you will conclude that there was more than ample proof, more than just reasonable cause to believe, but ample proof for Mr. Justice Keogh to believe that if we were permitted to

tap the wires, we would or we might—we don't have to assure the Court; only have to show the Court that there is a reasonable probability that evidence of the commission of a crime will thus be received.

And then I want to make one request of the Court. I cannot conceive of your Honor granting this motion on either one and certainly on both of the grounds that I have advanced, but if the improbable, from my point of view, should occur and your Honor does grant the motion, I do think we are entitled to ask you not to divulge the contents of those affidavits.

The Court: Yes.

Mr. Siegel: They constitute evidence.

The Court: That is entirely proper.

Mr. Siegel: Or the names of the person mentioned.

The Court: That is entirely proper.

Mr. Siegel: They constitute evidence on behalf of the district attorney, to which the defendant is not entitled in advance of trial.

We, therefore, respectfully submit that the motion should be denied in toto.

The Court: Do you want any time to put in any brief or anything?

Mr. Gold: There is no law on the subject, your Honor, unfortunately. I am not aware, as a matter of fact, of any application of this kind having been made prior to this one. Am I correct in that, Mr. Siegel?

Mr. Siegel: I have had a very short experience, your Honor. I have been chief of the appeals bureau for only thirteen years, but during those thirteen years no such application has come to my attention. I don't think we could submit any authority to you.

Mr. Gold: We do have a novel question, your Honor. If I may just say one thing in a short reply to Mr. Siegel's argument that he has presented to your Honor?

The original affidavit or affidavits, whatever they may be, which were before the court at the time the ex parte application was granted, I would respectfully submit to your Honor that more than just the mere affidavit is required under the mandate of Section 813-a; that the affidavit itself is insufficient. There must be evidence. "Evidence" to my mind means some kind of testimony in a situation of this kind, because I think your Honor is well aware, with your long experience as a judge of this court, that what appears in affidavits occasionally turns out differently when the witness takes the stand to testify, especially when he is subjected to examination, either cross-examination or examination by the Court.

The Court: You wouldn't expect there to be cross-examination on an application of that kind.

Mr. Gold: No, I would not, but it seems to me that the possibility might arise that the Court might ask the witness or witnesses questions which may lead it to believe, despite an affidavit, that there is not sufficient grounds to believe that evidence of crime may be obtained.

The Court: In other words, you think there must be a hearing?

Mr. Gold: That is right.

The Court: To the extent that the person who is supporting, or the persons supporting, the application should take the stand and testify?

Mr. Gold: That is correct, your Honor. That is my submission and I would submit to your Honor that the same requirement is implied.

The Court: It would be rather cumbersome, wouldn't it? Sometimes you require dispatch in these matters.

Mr. Gold: Well, no, your Honor, that would not be the fact because section 813-b of the Code of Criminal Procedure provides the so called hot-pursuit section; that where the authorities are in hot pursuit of the commission of crime, they may tap without a court order.

The Court: It might not be that hot.

Mr. Gold: The point is this—

The Court: And yet not so slow as the other method that you propose.

Mr. Gold: No, I don't think so, your Honor. Section 813-b covers precisely that situation because it authorizes a wire tap for a substantial period of time without a court order, so long as a court order is thereafter obtained to justify the original wire tap.

May I say this as well? Although the procedure may be to a degree cumbersome, the legislature has seen fit—

The Court: At times aren't some of these orders presented to a judge maybe at his home?

Mr. Gold: Under the Code of Criminal Procedure, this would be entirely unnecessary. There is time provided in the code for the application to be made in court, that it does not interfere with the proposed wire tap because they can wire tap without the court order where there is crime being committed, and then come in and apply for the court order and then the order may be granted which would then justify the initial wire tap without the court order.

But I think, your Honor, that this thing must be remembered—

The Court: I don't think much of your argument at this time in regard to having what might amount to a hearing.

Mr. Gold: Well, your Honor, may I just say this? If the legislature has seen fit to make wire tapping without a court order a felony, and that is a rather serious crime, to wire tap without a court order, so, therefore, I would say that it seems that the legislature envisioned some sort of procedure which would protect the community and that the mere affidavit alone, without something to support it—perhaps, not a hearing—but so long as it is something to support the affidavit without the bald assertions which, maybe, go into affidavits, as we know they sometimes do, the conclusions that are concluded. The statute says evidence. This I think is the key word.

The Court: I will take a look at it. Neither one wants to submit anything in the way of a brief?

Mr. Siegel: No, I don't think we could find anything.

The Court: I will reserve decision.

Mr. Siegel: Your Honor, before we conclude could I say just one word? I don't want to subject you to an interminable round of statement and answer.

Mr. Gold: I promise not to answer.

Mr. Siegel: There is one pithy statement made by Mr. Gold. I like his method of expression, but I want to expose the fallacy in it. He says the community. The legislature by making it a felony to wire tap indicates an intention to protect the community against unauthorized wire tap. I agree with that. The protection is the prosecution of the unauthorized wire tapper. It does not go to the extent of subjecting an authorized wire tapper, authorized by an

order of the court, to interminable proceedings of inquisition and inquiry by a counsel or a defendant who just by the merest accident learned that there was a wire tap.

The Court: All right.

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